BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CORA L. BATES	)	
Claimant	)	
	)	
VS.	)	
	)	
PLAZA WEST CARE CENTER	)	
Respondent	)	Docket No. 1,039,379
	)	
AND	)	
	)	
TECHNOLOGY INSURANCE CO.[1] **&**	)	
KANSAS HEALTHCARE WC INS. TRUST	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier Technology Insurance Co. request review of the May 28, 2008 preliminary hearing Order entered by Administrative Law Judge (ALJ) Brad E. Avery.

ISSUES

The ALJ granted claimant's request for benefits in the form of medical treatment and temporary total disability benefits (TTD) after he concluded that :

> Claimant suffered an initial incident in July of 2005. She was provided medical treatment and improved. She was re-injured after returning to regular duty in February of 2006. Claimant was returned to light duty in September of 2007 after being diagnosed with a rotator cuff tear to her right shoulder. See K.S.A. 44-508(d).[2]

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[1] Coverage began January 1, 2007.

[2] ALJ Order (May 28, 2008) at 1.

Although not specifically set out in the Order, it seems clear that the ALJ's conclusions result in liability for respondent and its carrier on the risk in September of 2007.[3]

Respondent and its carrier Technology Ins. Co., whose coverage spans January 1, 2007 to January 1, 2008, appealed the ALJ's ruling asserting a number of errors. Respondent/Technology contend that claimant's present need for treatment does not stem from a series of accidents. But rather, that her current need for treatment dates back to an earlier injury that occurred on November 13, 2004, an accident that has subsequently been settled and completely compromised.[4] Failing that argument, Respondent/Technology further contends that claimant failed to give notice of any series of accidents. Respondent/Technology also maintain that the ALJ erred when he concluded that claimant suffered a torn rotator cuff and when he awarded TTD benefits as no physician had taken claimant off work.

Claimant asserts that the ALJ's Order should be affirmed in all respects. Claimant concedes that in 2004 she sustained a compensable injury to her neck and left upper extremity. She goes on to state that the injury at issue in this claim involves her right upper extremity and is as a result of repetitively using her shoulder while working as either a CNA or a CMA, in respondent's facility. Claimant maintains that she continually notified her employer of her ongoing right shoulder complaints all the while continuing to perform her regular duties. Thus, claimant has satisfied the notice requirements of the Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

Claimant sustained a compensable injury in 2004 to her neck and left arm. After a period of conservative treatment she was released to return to work on February 10, 2005, without restriction. These facts are undisputed by the parties.

Claimant returned to her normal job duties, but on July 29, 2005, claimant testified that she sustained and reported a work-related injury to her right shoulder while pulling a resident up in bed. Claimant says she notified Bev Adams, the Human Resources Director. Ms. Adams acknowledges that in 2005 the claimant reported that her shoulder

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[3] Two carriers are involved in this claim as claimant's alleged injury/injuries encompass a period which implicates two carriers. The first carrier, Kansas Healthcare Association Workers' Compensation Insurance Trust is represented by Kip Kubin. But the Order does not assess any liability against that carrier as the date of accident is found to be September 2007, a date within Technology's coverage period.

[4] This claim, filed under Docket No. 1,036,570 was settled on December 4, 2007, and while it involved the same respondent, the insurance carrier was Diamond Insurance Group Ltd.

was hurting. An accident report was completed (referencing July 29, 2005) and after some delay, conservative treatment was provided through Dr. Donald Mead at St. Francis Hospital commencing October 14, 2005.

Claimant continued to work her regular work duties while seeing Dr. Mead and his physician's assistant Leon Herring. She was eventually released on February 17, 2006 with no impairment, but testified that her complaints continued and worsened as she kept working and constantly repositioning people in their beds and pushing lifts to move patients around.

When respondent would not provide any further treatment claimant sought an evaluation from Dr. Mary Franz, her personal physician, on April 30, 2007. Dr. Franz referred claimant to Dr. Teter, an orthopaedic surgeon who recommended surgery to the shoulder. On September 24, 2007, Bev Adams sent claimant to Dr. Mead, who placed claimant on light duty. Claimant's job duties were then altered and she was reassigned to work as a dietary aid, a job in which the duties are lighter in nature.

The difficulty here is that Bev Adams believes that, based on claimant's statements, claimant's right shoulder problems date back to the 2004 accident which has now been settled. The ALJ concluded that claimant's complaints were attributable to her work activities when she returned to her regular duties in February 2006 and culminating in an "accident" on September 24, 2007, the date she was restricted by the respondent's designated physician, Dr. Mead. And in granting her benefits he implicitly found that she provided timely notice as required by the Act. This Board Member has reviewed the record and concludes the ALJ's Order should be affirmed.

A claimant in a workers compensation proceeding has the burden of proof to establish by a preponderance of the credible evidence the right to an award of compensation and to prove the various conditions on which his or her right depends.[5] A claimant must establish that his personal injury was caused by an "accident arising out of and in the course of employment."[6] The phrase "arising out of" employment requires some causal connection between the injury and the employment.[7] The existence, nature and extent of the disability of an injured workman is a question of fact.[8] A workers compensation claimant's testimony alone is sufficient evidence of the claimant's physical

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[5] K.S.A. 44-501(a); *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

[6] K.S.A. 44-501(a).

[7] *Pinkston v. Rice Motor Co.*, 180 Kan. 295, 303 P.2d 197 (1956).

[8] *Armstrong v. City of Wichita*, 21 Kan. App. 2d 750, 907 P.2d 923 (1995).

condition.[9] The finder of fact is free to consider all the evidence and decide for itself the percent of disability the claimant suffers.[10]

Under these facts, this Board Member has no difficulty concluding (as did the ALJ) that claimant sustained a series of accidents as she was working for respondent. Claimant testified about her work duties and the need to constantly help patients while they were resting in bed. She would have to move them up, to adjust their positions and that act caused her additional injury. Claimant testified that she continued to complain of these problems and the human resources representative confirms those complaints as late as July 2007.

Ms. Adams acknowledges that the claimant filed an accident report in July 2005, also testified that she believed claimant attributed all of her complaints to the 2004 accident. The difficulty with that argument is that claimant's 2004 accident dealt with her neck and left arm. There was some mention in those records of bilateral trapezius complaints, but the bulk of the treatment and complaints related to the neck and left upper extremity. And while respondent's physician, Dr. Parmet, may attribute all of claimant's present complaints to 2004, his conclusion is largely driven by claimant's apparent assertion that her right shoulder problems began after her 2004 accident. Yet that is not borne out by the medical records.

Admittedly the claimant's testimony is somewhat difficult to follow as she is easily confused but the same can be said for Bev Adams. Both of these witnesses can deny one thing and at some point later in their testimony, confirm that very same fact. Nevertheless, taken as a whole, this Board Member finds that the ALJ's preliminary hearing Order should be affirmed. Claimant sustained an accidental injury arising out of and in the course of her employment over a period of time beginning in February 2006 and ending on September 24, 2007, the date respondent's designated physician placed claimant on restricted duty for her right shoulder complaints.[11]

This Member also finds claimant's notice was timely. K.S.A. 44-520 provides:

> **Notice of injury.** Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless

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[9] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

[10] *Carter v. Koch Engineering*, 12 Kan. App. 2d 74, 76, 735 P.2d 247, *rev. denied* 241 Kan. 838 (1987).

[11] K.S.A. 44-508 sets forth the method used to determine an employee's date of accident when repetitive injuries are involved. Here, there is no dispute that respondent sent claimant to Dr. Mead for her shoulder complaints and she was placed on restricted duty.

> notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

Claimant testified that she continued to advise Ms. Adams of her shoulder complaints. And while Ms. Adams may have thought that claimant's complaints related to the 2004 injury and at times claimant has even testified to that, the greater weight of the evidence supports claimant's theory that she sustained a new accident. Based upon the evidence presented at this juncture of the claim, this Board Member finds the ALJ's preliminary hearing Order should be affirmed.

As for the remaining two issues involving TTD and the ALJ's conclusion that the claimant requires surgery for her rotator cuff complaints, neither of these issues are jurisdictional at this point in the litigation.[12] The ALJ has the sole authority at a preliminary hearing to determine a claimant's right to TTD benefits and the entitlement to medical treatment. And although respondent alleges the ALJ exceeded his jurisdiction in grating claimant's request for medical treatment, this Board Member does not find that is the case.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.[13] Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Brad E. Avery dated May 28, 2008, is affirmed.

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[12] K.S.A. 44-534a.

[13] K.S.A. 44-534a.

IT IS SO ORDERED.

Dated this _____ day of August 2008.

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JULIE A.N. SAMPLE
BOARD MEMBER

c: George H. Pearson, Attorney for Claimant
Bart E. Eisfelder, Attorney for Respondent and Technology Insurance Co.
Kip A. Kubin, Attorney for Respondent and Kansas Healthcare WC Ins. Trust
Brad E. Avery, Administrative Law Judge